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10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF NEVADA**

12 JAMES L. POTTER and CHARLENE E.
13 POTTER (Husband and Wife as joint tenants),

14 Plaintiffs,

15 vs.

16 BANK OF AMERICA, N.A., BAC HOME
17 LOANS SERVICING, LP, TREASURY BANK,
N.A. and MORTGAGE ELECTRONIC
18 REGISTRATION SYSTEMS, INC.

19 Defendant.

Case No.: 2:10-cv-02095-GMN-GWF

**REPLY IN SUPPORT OF MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I.**

22 **INTRODUCTION**

23 Plaintiffs James and Charlene Potter do not dispute that they signed the note and deed of trust
24 secured by the subject property. Their second amended complaint seeks to prevent Defendants from
25 enforcing their rights to collect on the Note, but contains no ultimate facts on which to support the
26 Potters' requested relief.

1 **II.**

2 **LEGAL ARGUMENT**

3 **A. The Complaint Violates Rule 8(a)**

4 The Motion to Dismiss pointed out that the Complaint improperly lumps the Defendants
5 together in its allegations, thereby requiring dismissal. Motion, 3:14-24 (citing *Gen-Probe, Inc., v.*
6 *Amoco Corp.*, 926 F.Supp. 948, 960 (S.D.Cal. 1996); *Gauvin v. Trombatore*, 682 F.Supp. 1067, 1071
7 (N.D.Cal. 1988) (lumping defendants together fails to satisfy Rule 8 notice provision). Plaintiffs
8 allege that “[i]t is proper in cases where more than one defendant is adjoined by claim on the
9 mortgage in question that each or all related parties be brought forth in the suit.” Opp’n., 4:25-27).
10 Rule 8(a) does not prohibit bringing suit against multiple defendants; it does, however, require that the
11 complaint distinguish between named defendants or specify which defendant is targeted by which
12 allegation. In their Opposition, the Potters continue to lump together all defendants. Because there
13 are no direct allegations against moving defendants individually, all of the Potters' claims against
14 Defendants should be dismissed.

15 **B. The Potters' Claim for Declaratory Relief Fails Even If They Are Current On Their**
16 **Mortgage Payments**

17 Notwithstanding the Potters' failure to plead ultimate facts required to support their sole
18 "claim," which is actually an improper remedy request, the Potters have also failed to plead the
19 requisite elements for declaratory relief. The Potters allege there is a "genuine issue of material fact"
20 because defendants, in their motion to dismiss, mistakenly noted the Potters were in default.¹ See SAC
21 at "Summary." However, whether the Potters are in default does not create any issue of material fact
22 with respect to their sole claim for declaratory relief.

23 The threshold question before determining if a declaratory judgment is proper is whether there
24 is an actual controversy between parties who have adverse legal interests. See *Biodiversity Legal*

25
26 ¹ The undersigned reached out to the Potters via email and certified mail on two separate occasions to indicate
27 defendants intended to file the instant reply in support of their Motion wherein they would also clarify that the Potters were,
28 in fact, current on their mortgage payments. Notwithstanding these communications, the Potters also filed a separate
Motion for Sanctions [Dkt. 45] based on defendants' statement.

1 *Found. v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002) (a district court may entertain a request for
 2 declaratory relief "if there was a 'substantial controversy, between parties having adverse legal
 3 interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'")
 4 (citing *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996)); *Gov. Employees Ins.*
 5 *Co. v. Dizol*, 133 F.3d 1220, 1222 (9th Cir. 1998); *Am. States*, 15 F.3d at 143. Here, the Potters seek,
 6 through their SAC, a declaration from this Court regarding "who are and are not the real parties in
 7 interest to the Note and Deed of Trust..." See SAC, ¶2(D). Whether the Potters are in default is not
 8 material to their improper request.

9 III.

10 CONCLUSION

11 Because the Potters' second amended complaint is only for declaratory relief and they have
 12 failed to properly plead such a claim, defendants respectfully request the court grant this motion and
 13 dismiss the second amended complaint with prejudice.

14 Dated this 25th day of February, 2013.

AKERMAN SENTERFITT LLP

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 16 /s/ Christine M. Parvan
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 22 *Servicing, LP, and MERS*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of February, 2013 and pursuant to FRCP 5, I served via CM/ECF and/or deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT**, postage prepaid and addressed to:

James L. Potter
Charlene E. Potter
5721 Tropic Mist Street
Las Vegas, Nevada 89130

Plaintiffs in Proper Person

/s/ Debbie Julien

An employee of AKERMAN SENTERFITT LLP

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